IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. [illegible]

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,

Petitioners,

against

ALLEGA WILLIAMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE OF SUBMISSION, AND BRIEF ON BEHALF OF PETITIONERS.

JAMES L. MINNIS,
N. S. BROWN,
Counsel for Petitioners.
Railway Exchange Building,
St. Louis, Missouri.

St. Louis Law Printing Co., [illegible]

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List of Cases Cited:

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Petitioners,

—against—

ALLEGA WILLIAMS,
Respondent.

NOTICE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To Allega Williams, Respondent, or Roy W. Rucker, Esquire, His Attorney of Record:

Take notice that the petitioners above named will, on the 11th day of February 1918, at 12 o'clock noon, or as soon thereafter as counsel can be heard in the Supreme Court room, City of Washington, District of Columbia, submit to this Court the annexed petition for writ of *certiorari*, and the annexed brief

in support thereof, upon a copy of the transcript of the record herein, duly certified under the seal of the Supreme Court of Missouri.

St. Louis, Missouri, this 25th day of January 1918.

James L. Minnis

N. D. Brown

Counsel for Petitioners.

Service of the foregoing notice and papers therein mentioned together with a copy of the transcript of record in this cause is acknowledged this 26th day of January 1918.

Roy N. Ruskin

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .....

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners,

—against—

ALLEGA WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF ON BEHALF OF PETITIONERS.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioners, Edward B. Pryor and Edward F. Kearney, as Receivers of the Wabash Railroad Company, make this, their petition for a writ of *certiorari*, directed to the Supreme Court of the State of Missouri, and in support thereof respectfully show:

I.

The decision of the Supreme Court of the State of Missouri, which your petitioners seek to have reviewed by this Court, affirmed a judgment entered in the Circuit Court of Chariton County, Missouri, against your petitioners and in favor of respondent, in the sum of $5,000.00, as damages for personal injuries suffered by respondent while in the employ of your petitioners.

Respondent's cause of action was based upon the Federal Employers Liability Act. Respondent at the time of the accident was engaged in tearing down a trestle bridge on the line of the Wabash Railroad, near Ottumwa, Iowa. While using a tool known as a claw bar for the purpose of pulling a bridge bolt of twelve or fourteen inches in length from the bridge timbers, the claw bar slipped from the stem of the bolt, causing respondent to fall to the ground, a distance of twelve or fourteen feet.

The Supreme Court of Missouri, by its decision in this cause, refused to follow and give effect to the rule of the Federal courts defining the scope and effect of the defense of assumption of risk, and held that, where the employe continued to use a defective tool or appliance, with actual or implied knowledge of the defect, and the risk arising from such use, he was only guilty of contributory negligence. There-

fore, the important question involved is whether, in an action under the Federal Employers Liability Act, the rights and obligations of the parties to the suit depend upon said Act and the applicable principles of the common law as interpreted and applied by this Court, or upon the principles of the common law as interpreted and applied by the Supreme Court of the State of Missouri.

II.

On January 8, 1916, respondent filed his petition in the Circuit Court of Chariton County, Missouri, against your petitioners to recover the sum of $15,000.00, damages for personal injuries received by respondent on November 4, 1915. The petition, in substance (Rec., p. 7), alleges that plaintiff was in the employ and service of petitioners as a laborer in the track department of said Wabash Railroad, and was engaged, with other servants and employes of the petitioners, in taking down an old bridge over a stream known as Village Creek, near Ottumwa, Iowa, on the line of said railroad, preparatory to the building of a new bridge over said stream; that while respondent was working on said bridge he was ordered and directed by the foreman in charge of the work to draw a certain drift bolt from one of the bridge caps in said bridge; that said drift bolt was

a large iron or steel bolt about twelve inches long, securely fastened into said bridge cap, and that said bridge cap was a wooden cap or beam about twelve inches square and about thirty-six feet long, used in the construction of said bridge. That for the purpose of drawing said bolt the respondent was provided by petitioners with a certain claw bar, being an iron or steel bar about four or five feet long, with claws and a heel at one end, to be used by taking hold of the bolt with the claws, using the heel as a fulcrum and pressing down on the other end of the bar. That after respondent had cut the wood from around the head of said bolt so as to insert the claws of the claw bar underneath the head of the bolt, and had drawn the bolt as far as possible while using the head of the bolt to hold the bar, he took another hold on said bolt with the claws of said bar and undertook to further draw said bolt by pressing down on the other end of the bar; that while respondent was so pressing down on said bar in his effort to draw said bolt, and while he was pressing down on said bar with considerable force, but only such force as was necessary in order to draw the bolt, the claws on said bar, being much battered and worn, suddenly slipped on said bolt, whereby respondent was caused to fall from his position on said bridge cap to the ground below, a distance of twelve or sixteen feet, falling upon and striking with great force and vio-

lence certain timbers and piling there situate, whereby respondent was greatly and seriously hurt and bruised upon and about his whole body.

That said claw bar was caused to slip on said bolt and the respondent was caused to fall and to be hurt and injured by reason of the claws on said bar having become battered and worn to such extent that they would not take a firm hold on the bolt that was being drawn, and that because of such battered and worn condition of said claws the said claw bar was rendered dangerous and not reasonably safe for the work in which respondent was engaged at the time of his injury. That respondent without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said claw bar, and did not know that the same was unsafe for use in drawing said bolt.

That it was the duty of petitioners to use ordinary care to furnish respondent reasonably safe tools and appliances with which to work, and it was their duty to make reasonable and timely inspection and repairs thereto, to the end that the tools and appliances furnished him with which to work might be reasonably safe and suitable for the work he was required to do; but that petitioners negligently and carelessly failed and neglected to exercise such care and negligently and carelessly failed and neglected to furnish respondent a reasonably

safe claw bar with which to work, and negligently and carelessly furnished him a claw bar with which to draw said bolt that was old and battered and worn and unfit for the purpose for which it was provided and not reasonably safe for the work in which the respondent was engaged at the time he was injured; that the petitioners knew or by the exercise of ordinary care in the inspection of said claw bar should have known the defective, unfit and unsafe condition thereof as aforesaid, before the same was furnished to the respondent with which to draw said bolt, and in time to have repaired the same before it was furnished to him for that purpose, but that they negligently and carelessly failed and neglected to make reasonable, timely and necessary repair thereto.

In due time petitioners filed their answer to said petition denying the charges of negligence contained therein, and specially pleaded the defenses of contributory negligence and assumption of risk on the part of the respondent. These special pleas are as follows (Rec., p. 13):

1. Further answering said amended petition, defendants say that all the injuries, if any, complained of in plaintiff's petition, as having been suffered by him, were directly contributed and occasioned by his own carelessness and negligence.

2. Further answering said amended petition, de-

fendants say that the alleged injuries complained of in plaintiff's petition, as having been suffered by him, on account of which this action is prosecuted, arose out of the risk of the employment in which plaintiff was engaged, and of which he had full notice and knowledge, and that plaintiff, by entering and continuing in said employment, with full notice and knowledge of the dangers incident thereto, voluntarily assumed all of said risks.

On the 12th day of February, 1916, the case was tried in the Circuit Court of Chariton County, Missouri, and resulted in a judgment of $5,000.00, in favor of respondent and against your petitioners. After unsuccessful motions for new trial and in arrest of judgment your petitioners perfected their appeal to the Kansas City Court of Appeals of the State of Missouri, pursuant to the local statute.

On November 6, 1916, the said Kansas City Court of Appeals rendered its decision in said cause, reversing the judgment entered in the Circuit Court of Chariton County (Orig. Rec., p. 92; Pt., p. 83).

On November 16, 1916, respondent filed his motion for a rehearing of said cause in the said Kansas City Court of Appeals, for the following reason (Orig. Rec., p. 100; Pt., p. 90):

> "Respondent is denied the right to recover in this case on the theory that the Federal rule of

assumption of risk must be followed by this Court."

On November 27, 1916, the said Kansas City Court of Appeals overruled respondent's motion for a rehearing, but one of the Judges of said court, considering their opinion to be in conflict with the decision of the Supreme Court of Missouri, rendered in the case of Fish v. Chicago, Rock Island and Pacific Railroad, 263 Mo. 106, caused the said Court of Appeals to certify the said cause to the Supreme Court of the State of Missouri, pursuant to the local statute.

In due time the record in said cause was duly certified by said Kansas City Court of Appeals to the Supreme Court of Missouri.

On December 1, 1917, the said Supreme Court rendered its decision in said cause overruling the decision of the said Kansas City Court of Appeals, and affirming the judgment of the Circuit Court of Chariton County (Orig. Rec., p. 106; Pt., p. 97).

On December 8, 1917, your petitioners filed their motion for a rehearing of said cause in the Supreme Court of the State of Missouri, assigning the following reasons therefor (Orig. Rec., p. 118; Pt., p. 111):

(1) Because appellants (petitioners) claim and assert immunity from legal liability for the damages claimed by the petition filed herein, under and by virtue of the Act of Congress, entitled, "An Act Re-

lating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases", approved April 22, 1908, and amended by act of April 5, 1910, commonly known as the Federal Employers' Liability Act; and the decision of this Court is against such claim of immunity.

(2) The said decision erroneously holds that under the provisions of the said Federal Employers' Liability Act, the plaintiff (respondent) could not, under any circumstances, assume the risk of negligence of appellants (petitioners) in furnishing to him a defective claw bar with which to perform his work, because under the provisions of said Employers' Liability Act as interpreted and applied by the Supreme Court of the United States in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway Company, 241 U. S. 229, the plaintiff (respondent) did assume the risks of injury arising from the defects in said claw bar, of which he had knowledge, or which were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated.

(3) That the Court erroneously refused to apply to the facts in this case the rules respecting the defense of assumption of risk as expounded and applied by the Supreme Court of the United States; and erroneously decides that in a case under the Federal Employers' Liability Act, tried in the courts of this

state, the defense of assumption of risk is available to the appellants (petitioners) only to the extent that said defense is limited by the decisions of this Court, whereas, it is the duty of this Court in entering judgment in causes of action arising under said Employers' Liability Act, to expound, interpret and give effect to said act in accordance with the rule of decision with respect thereto as established and promulgated by the decisions of the Supreme Court of the United States, in the cases hereinabove mentioned.

(4) Because the decision and judgment of this Court is in conflict with the controlling decisions of the Supreme Court of the United States in the cases of Seaboard Air Line v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway Company, 241 U. S. 229.

On the 22nd day of December, 1917, said Supreme Court of Missouri overruled petitioners' motion for rehearing, and the said judgment of said Court is the final judgment in this cause of the highest court of said state.

III.

The pertinent facts as found by said Kansas City Court of Appeals (Orig. Rec., p. 96; Pt., p. 85), and adopted by the said Supreme Court (Orig. Rec., p. 106; Pt., p. 97) are as follows:

"Plaintiff who was 21 years old and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of "helping build steel bridges and taking down old ones". Shortly before his injury the foreman in charge of the work of tearing down an old bridge, ordered plaintiff to draw a certain drift bolt, which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteeen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut the wood from around the bolt with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the claw bar, which was one of the tools provided by defendants, and, so far as the evidence discloses, the only claw bar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the claw bar, which rested on the cap and served as the fulcrum. On the first application of the power exerted by plaintiff, who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws, so that the next application of power would be exerted at the place where

the bolt was being held in that grip. The men called this inching process "Arkansawing the bolt", and the evidence of plaintiff tends to show that such was the customary as well as the most expeditious method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and be held thereby from slipping. Plaintiff states that in "Arkansawing the bolt", he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

* * * * * * *

The railroad on which plaintiff was working was engaged in interstate commerce and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers Liability Act. * * * The defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to plaintiff (Orig. Rec., p. 99; Pt., p. 89). * * * The claw bar was battered and worn and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges

could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

In its opinion, the Supreme Court of Missouri held:

(1) That petitioners furnished to respondent a claw bar that was not reasonably safe for the performance of the work assigned by petitioners to respondent, and that the question of petitioners' negligence in that respect was one for the jury.

(2) That the furnishing of the worn and battered claw bar was negligence on the part of petitioners.

(3) That when respondent entered into or remained in the service of petitioners with actual or constructive knowledge of the defects and dangers arising from petitioners' said negligence, and without a promise of remedy, he was merely guilty of contributory negligence under the rule of the common law as interpreted and applied by said Supreme Court.

(4) That under the rule of the common law as interpreted and applied by said Supreme Court, respondent did not assume the risk of injury from using a defective claw bar, even though he had actual or implied knowledge of the defects and fully appreciated the risks incurred from such use.

(5) That in cases arising under the Federal Employers Liability Act the scope and effect of the defense of assumption of risk must be determined by the common-law rule, as it has been announced and applied by the Missouri courts, and not by the common-law rule as has been announced and applied by the Supreme Court of the United States.

The Supreme Court of Missouri refused to give effect to petitioners' defense of assumption of risk in this case as announced by the repeated decisions in this court, and particularly in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229, which said rule may be stated as follows:

> That the employe does not assume risks not naturally incident to the occupation, and which arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, until he becomes aware of the defect or disrepair, and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.
>
> When, however, the employe does know of the defect and appreciates the risk that is attributable to it, or the defect and risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated

them, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe does assume the risk, even though it arise out of the master's breach of duty to furnish reasonably safe tools and appliances for the work.

IV.

The question involved in this cause is of great importance, because if the decision of the Supreme Court of Missouri is allowed to stand, the result will be that the rights and obligations of the masters and servants coming within the purview of the Federal Employers Liability Act will lack that uniformity of administration which is essential to carry out the obvious intent of Congress in adopting this important legislation with respect to the railroads of the country and their employes.

As pointed out by this Court in the case of New York Central, Etc., R. R. v. Beaham, 242 U. S. 148-151:

> "the transactions in question related to interstate commerce; the consequent rights and liabilities depend upon acts of Congress, agreement between the parties and common-law principles accepted and enforced in Federal Courts."

And in the case of Southern Railway v. Gray, 241 U. S. 333, 338, 339:

> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal Courts."

Obviously, the defense of assumption of risk in a case arising under the Federal Employers' Liability Act must be given the same force and effect by the courts of the State of Missouri as in the courts of each and every other state of the Union.

It is submitted that this Court, by its decisions in the cases of Seaboard Air Line Railroad v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229, has adopted the rule of decision that it is the duty of the courts of the several states to determine the rights and obligations of the parties, in causes of action under the Federal Employers' Liability Act, in accordance with the principles of the common law as interpreted and applied by this Court. But the Supreme Court of the State of Missouri, by its decision in this cause, has expressly refused to give effect to petitioners' defense of assumption of risk, in accordance with the principles of the common law as interpreted and applied by this Court.

Wherefore, petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the

seal of this Court, directed to the Judges of the Supreme Court of the State of Missouri, commanding them, and each of them, to certify to and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court in the case lately pending therein, entitled, "Allega Williams, Respondent, v. Edward B. Pryor and Edward F. Kearney, as Receivers of the Wabash Railroad Company, Appellants," and being number 20077, as provided by Act of Congress, approved September 6th, 1916, amending Section 237 of the Judicial Code, to the end that the judgment of said Supreme Court in the said cause may be reviewed, as provided by law, and that your petitioners may have such other and further relief in the premises as to this Court may seem proper and in conformity with law.

And your petitioners will ever pray, etc.

EDWARD B. PRYOR and
EDWARD F. KEARNEY,
as Receivers of the Wabash Railroad Company.

By Edward F. Kearney
One of said Receivers.

I hereby certify that I have examined the foregoing and annexed petition and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

James L. Minnis,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. .....

EDWARD B. PRYOR and EDWARD F. KEARNEY, as Receivers of the WABASH RAILROAD COMPANY,
Petitioners.

—against—

ALLEGA WILLIAMS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petition for writ of *certiorari* to the Supreme Court of the State of Missouri, to review a decision of said Court affirming a judgment against petitioners and in favor of respondent in the sum of $5,000.00, in a cause of action based upon the Federal Employers' Liability Act.

The case was tried in the Circuit Court of Chariton County, Missouri, and the jury returned a verdict for the sum stated. In due time petitioners appealed the case to the Kansas City Court of Appeals, pursuant to the local statute. Thereafter the Kansas City Court of Appeals rendered its decision in said cause reversing the judgment of the trial court, and held that respondent had, in the circumstances shown by the evidence, assumed the risk of the injuries received, under the rules of the common law as applied by the Federal courts. Respondent filed a motion for rehearing in said Court of Appeals upon the sole ground that the said Court erred in its opinion in interpreting and applying the doctrine of assumption of risk in accordance with the Federal rule, contrary to the rule adopted by the Supreme Court of the State of Missouri in a prior case, to wit, Fish v. Chicago, Rock Island and Pacific Railroad, 263 Mo. 106, wherein said Supreme Court held that the defense of assumption of risk in a cause of action based upon the Federal Employers' Liability Act should be interpreted and applied in accordance with the rules of the common law as interpreted by the Supreme Court of said state, and not by the rule of the Federal courts. Thereafter the said Kansas City Court of Appeals overruled respondent's motion for rehearing, but certified the said cause to the Supreme Court of said state, pursuant to local practice, because one

of the Judges of said Court of Appeals considered their opinion in this cause in conflict with the decision of the Supreme Court of said state in the Fish case. In due time the Supreme Court of said state rendered its decision in said cause, wherein they reaffirmed the doctrine announced by them in the Fish case, and stated in language unmistakable that the defense of assumption of risk in cases tried in the courts of that state, and arising under the Federal Employers' Liability Act, should be given the scope and effect, and such scope and effect only, as said doctrine was limited by the rules of the common law as interpreted and applied by said Court, and expressly refused to follow and apply the rules of the Federal Courts with respect to said defense in such cases. By its decision the Supreme Court of said state firmly announced their doctrine that the employe never assumes the risk of injury where the evidence shows that the employer failed in his duty to furnish the employe a reasonably safe place or reasonably safe tools or appliances with which to perform the work, even though the employe at the time of entering the employment knew of such defects and the risks arising therefrom, or the defects and risks were so obvious to the employe that it should be presumed that he had knowledge thereof and appreciated the danger.

The facts in the case as found by the Kansas City Court of Appeals, and adopted by the Supreme Court of Missouri as the basis for its decision, are fully set forth in the petition filed herein (*ante*, p. 12), and need not be here repeated.

ARGUMENT.

I.

The Federal Question.

Since the cause of action is expressly based upon the Federal Employers' Liability Act, it is obvious that a Federal question is involved.

Southern Railway v. Gray, 241 U. S., *l. c.* 338-339;
Kansas City, Etc., Ry. Co. v. Jones, 241 U. S. 181;
New York, Etc., R. R. v. Beaham, 242 U. S. 148-151.

II.

The Decision of the Supreme Court of the State of Missouri Is Erroneous Because in Conflict With the Ruling Decisions of This Court.

The cardinal questions here involved are: (1) Is the defense of assumption of risk, in a suit brought in a state court and based upon the Federal Employers' Liability Act, to be given effect according to the applicable principles of the common law as interpreted and applied by this Court; and is it the duty of the courts of the several states, in such circumstances, to follow such Federal rule of decision

in passing judgment on said defense; and (2) did the Supreme Court of Missouri err in its construction of the said Act with respect to the scope and effect of the defense of assumption of risk?

It is submitted that both of the questions just stated have been answered by this Court in the affirmative by the decisions in Seaboard Air Line R. R. v. Horton, 233 U. S. 492, and Jacobs v. Southern Railway, 241 U. S. 229. But, as heretofore stated, the Supreme Court of said state refused to follow the rule of decision established in said cases, and on the contrary held that the defense of assumption of risk in such cases was to be interpreted and applied in accordance with the rule of decision established by the highest court of that state.

For the convenience of the Court we make the following statement and extensive excerpts from the opinions of the Court in the above cases.

In the Horton case the controlling points of decision were:

(1) Whether the statute of North Carolina, which expressly abolished the defense of assumption of risk in all cases where the evidence tended to show that the employer was guilty of negligence in furnishing defective machinery, ways and appliances for the use of the employe could be given effect in an action based on the Federal Employers' Liability Act; and (2) whether the defense of assumption of risk should

be interpreted and applied in accordance with the Federal rule of decision.

In that case plaintiff sued the railroad company to recover damages for personal injuries sustained by him while in defendant's employ as a locomotive engineer. His evidence tended to show that on the date of the accident he was in charge of defendant's locomotive engine; that the engine was equipped with a water gauge, a device attached to the boiler head, for the purpose of showing the level of the water in the boiler, and consisting of a brass frame or case inclosing a thin glass tube which comunicated with the boiler above and below, in such manner that the tube received water and steam direct from the boiler and under the full boiler pressure. In order to shield the engineer from injury in case of the bursting of the tube, a piece of ordinary glass known as a guard glass should have been provided, this being a part of the regular equipment of the water gauge. But defendant had failed to provide this guard glass, and by reason of this failure, plaintiff was injured by the bursting of the water gauge. There was evidence tending to show that plaintiff had knowledge of the fact that the guard glass had been removed from around the water gauge, and that he appreciated the danger of injury by reason of its absence. Under instructions of the Court, the case was sub-

mitted to the jury upon three issues, to which responses were made, as follows:

> 1. Was the plaintiff injured by defendant's negligence? Answer. Yes.
> 2. If so, did plaintiff assume the risk of injury? Answer. No.
> 3. Did plaintiff by his own negligence contribute to his injury? Answer. Yes.

In considering the case upon its merits this Court said (*l. c.* 499):

> "We need consider only certain assignments of error that are based upon exceptions to the action of the trial judge in giving and refusing to give instructions relating to the issues of defendant's negligence, the assumption of risk, and contributory negligence."

Continuing, this Court said (*l. c.* 499):

> "At the outset we observe that the Judge evidently misapprehended the effect of the Federal Act upon state legislation. Thus, the jury was told that plaintiff had brought the action under the Federal statute; 'and where Congress enacts a law, within the limits of its power, that law should be enforced uniformly throughout the entire United States. If it is in conflict with the state law, the state law is superseded, but where there is no conflict **expressed by the statute** of the United States, then the rule of the state pre-

vails.' This, of course, in the absence of a specific statement of the applicable rule of the state law, might be treated as academic. But the theory was carried into the specific instructions, to the extent that upon the question of the employer's duty and the assumption of risk by the employe, the charge was modeled rather upon the North Carolina statute than upon the Act of Congress. By Sec. 2646, Nor. Car., Revisal of 1905, 'Any servant or employe of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employe who shall have suffered death in the course of his services or employment with such company **by the negligence, carelessness or incompetence of any other servant, employe or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.** Any contract or agreement, expressed or implied, made by any employe of such company to waive the benefit of this section shall be null and void.'

"Upon the issue of defendant's negligence the trial court charged the jury as follows: 'It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work.' And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place or work and of the appliances for the work. Thus: 'If you find from the evidence that it (locomotive engine) was turned over to him without the

guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue "Yes".'

"**In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute.** But it is settled that since Congress, by the Act of 1908, took possession of the field of the employer's liability to employes in interstate transportation by rail, all state laws upon the subject are superseded (Second Employers Liability Cases, 223 U. S. 1, 55)."

The Court then proceeds to examine and interpret Sections 1, 3 and 4 of the Federal Act, and says (*l. c.* 503):

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases **such assumption shall have its former effect as a complete bar to the action.** And, taking sections 3 and 4 together,

there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employe, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, **while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.**

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But

risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Choctaw, Oklahoma & Gulf R. Co. v. McDade, 191 U. S. 64, 68; Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 220 U. S. 590, 596; Tex. & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 321; Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 102, and cases cited).

"When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employe relying upon the promise, does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man, under the circumstances would rely upon such promise (Hough v. Railway Co., 100 U. S. 213, 224; Southwestern

Brewery v. Schmidt, 226 U. S. 162, 168). This branch of the law of master and servant seems to be traceable to Holmes v. Clark, 6 Hurl. & Norm. 348; Clarke v. Holmes, 7 Hurl. & Norm. 937.

"In the light of these principles, the rulings of the trial court in the case at bar must be considered.

"Defendant specifically requested an instruction that **plaintiff's right to recover damages was to be determined by the provisions of the Federal Act,** and that 'if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious, and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes".' **The Court gave this instruction as applicable to the issue of contributory negligence, and instead of the words 'then the Court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes",' used the words, 'then the Court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue "Yes".'** To the refusal to give the instruction as requested, and the modification of it, defendant excepted.

"The trial court evidently deemed, as did the State Supreme Court, that the topic of assumption

of risk, with reference to the circumstances of the case, was sufficiently and properly covered by an instruction actually given as follows, after stating in general terms that 'A man assumes the risk, when he takes employment, incident to the class of work which he has to perform', but that 'He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work', the Court proceeded as follows:

" 'On the other hand, the employer has the right to assume that his employe will go about the work in a reasonably safe way, and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight, because the burden in this instance is on the defendant, that the plaintiff knew of the absence of the guard or shield to the water gauge and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care.'

"It will be observed that by this instruction the application of the rule of assumption of risk was conditioned upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here, again, the Court appears

to have followed the local statute, rather than the act of Congress; for Section 2646, Nor. Car. Revisal of 1905, already quoted, has been held by the State Supreme Court to abolish assumption of risk as a bar to an action by a railroad employe for an injury attributable to defective appliances furnished by the employer (Coley v. Railroad Co., 128 Nor. Car. 534). **The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employe is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employes contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law.** An instruction to the jury to this effect preceded the instructions we have just quoted.

"It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the Safety Appliance Act, or any other law passed by Congress for the safety of employes, in force at the time this action arose. But the necessary result of this is, not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the **ordinary** application of the common-law rule. **The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject matter.**

"By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time and was subsequently broken. But by the common law, with respect to the assumption by the employe of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employe and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water gauge without giving notice of the defect to the defendant or its representative, he assumed the risk.

"**Defendant was entitled to have the requested instruction given respecting assumption of risk,** and as the charge actually given did not cover the same ground, there was error.

"Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in

the manner requested by defendant, the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence.

"The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion." (Bold-face type ours.)

In *Jacobs v. Southern Railway*, 241 U. S. 229, the Supreme Court had occasion again to consider the question whether the defense of assumption of risk was to be applied as that doctrine is defined and applied by the statute or ruling of law of the several states, or as defined by this Court under the Federal law.

Plaintiff was in the service of the defendant as a fireman. He received injuries while attempting to get on a moving locomotive. The negligence charged was the causing and permitting to be within dangerous proximity to the tracks of the company a pile of loose cinders over which plaintiff stumbled and slipped and was drawn under the locomotive. The defendant asserted the defense of assumption of risk. In that case the plaintiff testified:

"I had knowledge of it, of the cinders being there, but I didn't know that it was dangerous. I had forgotten them being there at the time. I

was watching when I was going to step on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile—it was not in my mind."

The jury found for the defendant and this finding was affirmed by the Virginia Supreme Court of Appeals. Thereupon, plaintiff sued out a writ of error to this Court and complained of the action of the trial court in instructing the jury as follows:

"The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress, approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

Plaintiff also complained of the action of the trial court in refusing instructions which presented these propositions (*l. c.* 233):

"(1) The unsafe character or condition of the

railway was of itself no defense to the injury caused thereby.

"(2) Knowledge of it by plaintiff might constitute contributory negligence and diminish the amount of recovery.

"(3) If the company suffered or permitted the cinders to be placed and to accumulate alongside of its main line in dangerous proximity to the railroad track or right-of-way, and plaintiff's injury resulted in whole or in part from such negligence, or if the cinders constituted a defect or insufficiency in the railroad track, the verdict should be for plaintiff.

"(4) Knowledge of the existence of the cinders would not bar recovery, but it might be considered with other evidence in determining whether plaintiff was guilty of contributory negligence, and if guilty recovery would not be barred, but the amount of recovery would be diminished in proportion to such negligence.

"(5) To charge plaintiff with contributory negligence he must not only have known of the cinders, but also the danger occasioned by them, or that the danger was so obvious that a man of ordinary prudence would have appreciated it and not have attempted to get upon the engine at the time and under the circumstances disclosed by the evidence."

In ruling upon the correctness of the decisions of the state courts in the giving and refusal to give the instructions stated, this Court said (*l. c.* 233):

"The rulings of the trial court and Supreme

Court of Appeals upon the instruction given and those refused make the question here, and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost, to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Indeetl, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employes' continuance in service with knowledge of a dangerous condition and without complaint does not bar recovery under the Act of Congress. He concedes, however, that he encounters in opposition to his contentions the ruling in Seaboard Air Line v. Horton, 223 U. S. 492, and therefore asks a review of that case, asserting that 'the considerations upon which the true construction of the act depends were not suggested to the Court'.

"The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express it through a comparison of the sections of the act, and insists that to retain the common-law doctrine of the assump-

tion of risk is to put the fourth section in conflict with the other sections. **The basis of the contention is that the act was intended to be punitive of negligence, and does not cast on the employes of carriers the assumption of risk of any condition or situation caused by such negligence.** This is manifest, it is insisted, from the provisions of the third section of the act, which provides that the contributory negligence of the employe 'shall not bar a recovery', and of the fifth section, which precludes the carrier from exempting itself from liability. This purpose is executed, and can only be executed, it is urged, by construing the words of section 4 (which we shall presently quote) to apply to 'the ordinary risks inherent in the business—the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.' And, further: **'The object of this section was not to adopt, by implication, the common-law defense of assumption of risk of such abnormal dangers.** Its object was in express terms to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employe.'

"These, then, are the considerations which plaintiff says were not submitted to the Court in the Horton case, and which he urges to support his contention that assumption of risk has been abolished absolutely.

"We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language, and makes it express one meaning when it intended another.

"The language of section 4 demonstrates its meaning. It provides that in any action brought by an employe he 'shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe'. It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employes. In other cases, therefore, it is retained. And such is the ruling in the Horton case, made upon due consideration and analysis of the statute and those to which it referred. It was said: 'It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action'. And there was a comparison made of section 4 with the other sections and the relation and meaning of each determined and the preservation by the statute of the distinction between assumption of risk and contributory negligence, which was pronounced 'simple', although 'sometimes overlooked'. Cases were cited in which the distinction was recognized and applied (page 504).

"It is, however, contended that the conditions of the application of assumption of risk were not

established and that 'to charge a servant with assumption of risk the evidence (1) must show that he was "chargeable with knowledge of the material conditions which were the immediate cause of his injury", and (2) must establish his "appreciation of the dangers produced by the abnormal conditions".' The testimony of plaintiff is adduced to show that these conditions did not exist in his case.

"He admitted a knowledge of the 'material conditions', and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon' could be considered as not having appreciated the danger and assumed the risk of the situation **because he had forgotten their existence** at the time and did not notice them. We think his situation brought him within the rule of the cases (Gila Valley Ry. v. Hall, 232 U. S. 94).

"It is objected, however, that instruction A, 'viewed wholly with reference to common-law principles', is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did 'not correctly state the common-law doctrine of assumption of risk'. It was therefore very indeterminate, and we can not say that the Court considered that it was di-

rected to the omission to express or to bring into prominence the appreciation by plaintiff of the danger he incurred.

"The instruction was refused by the trial court upon the objection by plaintiff. It was considered by the Supreme Court of Appeals and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the Act of Congress. **He made the contention there that he does here, and which we have already considered, that the Act of Congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier.** And this was the full extent of plaintiff's contention. Had he made the specific one now made the Supreme Court of Appeals would have dealt with it, for the opinion of the Court shows a clear recognition of the elements necessary to the doctrine of assumption of risk and the trial court as well must have understood them; and we can not suppose that the Court discerned in plaintiff's general objection the specification which he now contends was necessary and which it was error to refuse." (Bold-face type ours.)

The Supreme Court of Missouri did not feel in duty bound to follow the rule of decision announced by this Court in the foregoing cases. That Court first considered the question here involved, in rendering its decision in the case of Fish v. Railroad, 263 Mo. 106, and reached the conclusion that the defense of

assumption of risk, being a common-law defense, was to be applied in accordance with the interpretation given to such defense by the rule of decision of that Court, even though the cause of action be based on the Federal Employers' Liability Act. The rule announced in the Fish case is reaffirmed by the decision of said Supreme Court in the instant case.

We quote the following excerpts from the opinion of said Court in the case at bar to demonstrate the conflict between the rule of decision therein established, and the rule announced by this Court in the Horton and Jacobs cases:

> "The subjects of assumption of risk, and contributory negligence are often confusedly discussed in the cases. In Fish v. Ry., 263 Mo. 106, this Court clarified the atmosphere to the extent of holding that there could be no assumption of risk, except in cases where the relation of master and servant existed, which relation might be by either an express or an implied contract. The instant case is one which falls within the class of cases in which the doctrine of assumed risk may be invoked. The real question in the case is, whether or not the things charged to the plaintiff herein, by the pleadings and proof, are things properly classed under the subject of assumed risks, **or are they mere matters of contributory negligence?**
>
> "We start with the rule that where one employs another to do a given work (thus creating

the relationship of master and servant), the latter (the servant) assumes the ordinary and usual risks incident to such employment. We then advance to another simple and well-defined rule, that it is the duty of the employer to furnish to the employe a reasonably safe place within which to perform the work, and reasonably safe tools with which to perform it. These duties are what we denominate non-delegable duties. They rest upon the master, and if he leaves those duties to be performed by another, he is responsible for the performance. In other words, the master can never shift liability by saying that he had a competent person do these things for him. They are non-delegable duties in the sense that the master is always responsible for the faithful performance of them.

"In the instant case the master furnished to the plaintiff a claw bar which, according to the evidence of the plaintiff, was not reasonably safe for the performance of the work assigned by the master to the servant. At least the jury could have found from the evidence that the tool as furnished was not reasonably safe for the performance of the work. The question then of the master's negligence was one for the jury, and the jury has found that the master was negligent. The simple tool doctrine urged by the defendant we discuss later. What we now want to make clear is the fact that there is evidence in this record from which a jury might well find that the master was negligent in the furnishing the claw bar used by the plaintiff, unless the simple tool doctrine changes the situation, and this doc-

trine can not change the situation, except upon two theories, *i. e.,* (1) that there is no negligence upon the master in furnishing to the servant a simple tool, which is defective, and (2) that by the use of such defective simple tool, the servant assumed the risk. But, as stated, we will discuss simple tools later. What we now desire to discuss is the situation of the law, on the theory that the furnishing of the defective claw bar was negligence upon the part of the defendant, as the jury has found.

"It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master (Fish v. Ry., 263 M., *l. c.* 125; Charlton v. Railroad, 200 M., *l. c.* 433; Patrum v. Railroad, 259 M., *l. c.* 124; George v. Railroad, 225 M., *l. c.* 407). These cases and the cases cited therein thoroughly state the rule and reasons therefor.

* * * * * * *

"We have here in Missouri, whether logically or illogically we need not here pause to discuss, come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous avocation when unaffected by the negligence of the master.

"When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence.

"Now, in the instant case, if the furnishing of the worn and battered claw bar was negligence upon the part of the master, then under the Missouri rule, so long and so firmly fixed, there is no assumption of risk in the use of such tool. If the tool was so patently defective that an ordinarily careful and prudent man would not have used it, then we have the plaintiff doing what an ordinarily careful and prudent man would not have done, having in view his own self-protection, and such use would be negligence upon his part, which negligence contributed to his injury. In other words, we would have negligence upon the part of defendant, and contributory negligence upon the part of the plaintiff. But under the Federal law this contributory negligence does not bar a recovery, but may be only shown to reduce the damages. If, therefore, the furnishing of this claw bar, in its defective condition, was negligence upon the part of the master, there is no assumption of risk in the case, and the most there is for the defendant is the alleged contributory negligence, and the demurrers to the evidence could not be sustained on that ground, under the Federal law.

"In Fish v. Ry. Co., 263 Mo. 106, we properly held that under the Federal statutes there were two classes of cases, (1) a class of cases wherein the assumption of risk could not be invoked, and (2) a class of cases wherein the defendant could invoke the doctrine of assumed risk. With this ruling we are fully satisfied, and the case now before us is within the latter class above named. But in the Fish case, *supra*, we further held that

as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common-law rule, and to this doctrine we now adhere. **Not only so, but we say now, in plain terms, what was inferentially said in the Fish case, and that is, by the common-law rule, we mean the rule of the common law, as it had been announced by the Missouri courts.** That rule is, that the servant never assumes a risk where such risk is the outgrowth of the master's negligent act. In Missouri the use of a glaringly defective tool may show negligence upon the part of the party so using it, but such party does not assume the risk which was created by the negligent act of the master in furnishing such tool. In such cases we hold that the plaintiff can not recover on the ground of his own negligence, *i. e.*, his doing a thing which an ordinarily careful and prudent man would not have done, having in view his own safety. **In the Fish case, supra, we denominated this contributory negligence, and we still adhere to that rule.** The Fish case is not the only Missouri case so to announce, but, on the contrary, many cases so hold. If assumption of risk grows out of the contractual relation of master and servant, as our cases hold, then there is no other place to give such acts of the servant than to the field of contributory negligence. The risks he assumes are those he contracted to assume, *i. e.*, those necessarily incident to the work. Not risks which grow out of negligence, whether such negligence comes from the one contracting party or from the other. If the

neglect is that of the master, we simply denominate it negligence. If the neglect is that of the servant, and he is suing for the neglect of the master, we denominate it contributory negligence. To illustrate by the case at bar. It was the duty of the master to furnish the servant a reasonably safe claw bar with which to do the work. The failure to furnish that character of a claw bar was negligence upon the part of the master. If the defects were so glaring, and the claw bar so patently defective that an ordinarily prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute.

"So that we reach this point, in this case, if we were right in the Fish case, the Court of Appeals is wrong in the opinion certified with the case to this Court. We are not shaken from our views in the Fish case. Under the ruling of that case, there is no assumption of risk in the case at bar, if there was negligence upon the part of the master in furnishing the kind of claw bar that was furnished. The evidence was such as to authorize the submission of the question of the master's negligence to the jury, and the jury has found the master negligent. The matter of plaintiff's contributory negligence was submitted to the jury by proper instruction under the Federal act, which permitted the jury to consider the same in reducing damages.

"Whatever the rule as to assumption of risk

may be in other jurisdictions, we are satisfied with the Missouri rule. **We are as yet not convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute, wherein assumption of risk could be invoked as a defense, that such assumption of risk was that of the common law as interpreted by this Court, in cases tried in our Court.** As this Court interprets the common law, there can be no assumption of a risk occasioned by the negligence of the master. We find no Federal case discussing the right of this Court to apply its common-law rule in determining whether or not the defense of assumed risk is in a case. **Until the higher court says we can not apply the common-law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases, i. e., that the servant never assumes a risk which is the outgrowth of the master's negligence, and further, that if such servant remain in a glaringly unsafe place, or use a glaringly unsafe tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master.**

"We now come to the simple-tool doctrine urged by the defendants. As indicated above, this so-called doctrine can not avail the defendants, except upon one of two theories, *i. e.*, (1) that it is not negligence upon the part of the master to furnish a tool which is not reasonably safe for the performance of the work, if such is

of simple mechanism and not a complicated one, and (2) that the servant assumed the risk of using such tool.

"What we have previously said practically disposes of this question. It is negligence for a master to furnish a tool which is not reasonably safe to be used on the work, and we care not what the character of the tool, in so far as the negligence of the master is concerned. Because the contract of hiring called for a reasonably safe place wherein to work, and reasonably safe tools with which to work. When we say the contract of hiring, we mean such a contract of hiring as we have before us in the present case. If the master says to the servant I have certain work to do, and here are the tools you must use, and the servant accepts the employment, we might have a different case, but that is not this case, nor do we say we would have a different case, because the contracting against his own negligence might be a factor. However, we had better adhere to the case here.

"Going back to the so-called simple tool doctrine, what is there to be found in it? In its last analysis it is nothing more than that of contributory negligence. A servant picks up a hoe, an axe, or a claw bar, and if the defects are open and glaring, and so open and glaring that a reasonably prudent person would not undertake to use them in the work being done, then the use of the tool would not be the exercise of ordinary care upon his part for his own protection. This failure to use ordinary care is negligence, and if he sues the master for the master's neglect in fur-

nishing an unsafe tool, the master may respond and say the tool was a simple device, and any ordinary person could have seen and known the defects thereof, and in using it in that condition you have been guilty of negligence which contributed to your injury, and you can not recover. To my mind that is all there is in the so-called simple tool doctrine in states like Missouri, where we have fixed views upon assumed risk. You can show the simple character of the tool, and the obviousness of the defects, to show contributory negligence." (Bold-face type ours.)

It will be remembered that the Kansas City Court of Appeals found the facts in this case to be that:

> "The defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff" (Orig. Rec., p. 99, Pt. 89).

And that:

> "The claw bar was battered and worn, and a mere look at the claws would have disclosed the battered, rounded edges and would have proclaimed to the most common understanding that such edges could not be made to take firm hold upon the bolt shank. The risk was just as obvious as the defect. This was a simple tool which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

It seems obvious, therefore, that if it was the duty of the Supreme Court of the State of Missouri to give effect to petitioners' defense of assumption of risk in the light of the facts as found by the Kansas City Court of Appeals, the decision of said Court is erroneous. It is equally obvious that, according to the rule of decision established by this Court in the Horton and Jacobs cases, *supra*, it was the clear duty of the Supreme Court of Missouri to interpret and give effect to the defense of assumption of risk, in accordance with the rule of decision established by this Court.

We, therefore, respectfully submit that it is a matter of great importance that the rights and obligations of the employers and employes coming within the purview of the Federal Employers' Liability Act shall be given a uniform application by courts of the several states. The only way such uniformity can be established is to require each of the state courts to follow the rule of decision with respect to the rights and obligations arising under said act, in accordance with the controlling decisions of this Court. As the decision of the Supreme Court of the State of Missouri is in obvious conflict with the rule established

by this Court, the petition for *certiorari* should be granted.

Respectfully submitted,

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.....,

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